Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK BEARY,

Petitioner,

– against –

WEST PUBLISHING COMPANY,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITIONER'S REPLY BRIEF

PATRICK BEARY
Petitioner Pro Se
161-10 Jamaica Avenue
Jamaica, New York 11432
(718) 526-4100

BEST AVAILABLE COPY

25pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT:	
1. THE SECOND CIRCUIT HAS SET A BAD PRECEDENT IN RULING THAT WEST IS ENTITLED TO ABSOLUTE IMMUNITY UNDER CIVIL RIGHTS LAW SEC. 74 IN PUBLISHING A NEW YORK JUDGE'S OPINION SENT DIRECTLY TO WEST INSTEAD OF TO THE STATE REPORTER, AS MANDATED BY JUDICIARY LAW SEC. 432 ..	2
2. WEST SHOULD HAVE BEEN ESTOPPED FROM INTERPOSING CIVIL RIGHTS LAW SEC. 74 AS A DEFENSE	12
3. WEST FORFEITED ANY CLAIMED IMMUNITY UNDER CIVIL RIGHTS LAW SEC. 74 BECAUSE IT DID NOT PUBLISH THE OPINION AS JUDGE FRIEDMANN WROTE IT, BUT RATHER WEST ADMITTEDLY ADDED BEARY'S FIRST NAME TO THE TITLE OF JUDGE FRIEDMANN'S OPINION, THEREBY EXACERBATING THE LIBEL	14
4. PETITIONER'S APPEAL WAS NOT "PATENTLY FRIVOLOUS" AND DID NOT WARRANT THE IMPOSITION OF SANCTIONS BY THE SECOND CIRCUIT	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Pages
Belli v. Orlando Daily Newspapers, Inc. 389 F.2d 579 (5th Cir. 1967) ...	19
Branca v. Mayesh 101 A.D. 2d 872, 476 N.Y.S 2d 187 (2d Dept. 1984) aff'd 63 N.Y. 2d 994	4,7,8, 9
Carney v. Memorial Hospital 64 N.Y. 2d 770	19
Edmiston v. Time, Inc. 257 F. Supp. 22 (U.S.D.C.-S.D.N.Y. 1966)	10
Davis v. Ross 754 F. 2d 80 (2d Cir. 1985)	17,19
HNC Realty v. Bay View 125 Misc. 2d 1088 (N.Y.)	7
Lowenschuss v. West Publishing Co. 542 F.2d 180 (3d Cir. 1976)	7
Mencher v. Chesley 297 N.Y. 94	18
Murray v. Brancato 290 N.Y. 52, 48 N.E.2d 257 (1943)	12,13
November v. Time, Inc. 13 N.Y. 2d 175	18
Phillips v. Murchison 252 F. Supp. 513 (U.S.D.C.-S.D.N.Y. 1966)	10

TABLE OF AUTHORITIES (cont.)

Cases — Pages

Rode v. Branca
481 F. Supp. 808 (U.S.D.C.-E.D.N.Y. 1979) 9

Rosenblatt v. Baer
383 U.S. 75 6

Sharon v. Time, Inc.
575 F. Supp. 1162 18

Williams v. Williams
23 N.Y.2d 592 (1969) 5,7,8, 9,10

Statutes
N.Y.Judiciary Law Secs. 431,432 ....1,2,3, 11,20

N.Y.Civil Rights Law Sec. 74 ...1,2,3,4,5, 6,8,10, 11, 12,13,14,15, 16,20

N.Y.Civil Practice Act Sec. 337.... 12,13

Court Rules
Federal Rules of Civil Practice
56(e) 20

Other Authorities
NY PJI Supp.
3:24, p.103 18

No. 85-286

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PATRICK BEARY,

Petitioner,

-against-

WEST PUBLISHING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

This should be regarded as a case of first impression in view of the Second Circuit's ruling that the absolute privilege granted by New York Civil Rights Law Sec. 74 is not conditioned upon compliance with Sec. 432 of that state's Judiciary Law. Never before were the courts presented with the problem of

dealing with the interrelation of these particular statutes with one another.

ARGUMENT

1. THE SECOND CIRCUIT HAS SET A BAD PRECEDENT IN RULING THAT WEST IS ENTITLED TO ABSOLUTE IMMUNITY UNDER CIVIL RIGHTS LAW SEC. 74 IN PUBLISHING A NEW YORK JUDGE'S OPINION SENT DIRECTLY TO WEST INSTEAD OF TO THE STATE REPORTER, AS MANDATED BY JUDICIARY LAW SEC. 432

With reference to Judge Friedmann's decision which allegedly defamed Beary, West boldly asserts on p. 4 of its opposing brief herein that "under Section 74 it is irrelevant how or from whom West received the opinion; all that matters is that West published the opinion as the judge wrote it which West did here."

Thus it may be assumed, as alleged in paragraph "13" of Beary's complaint, that Judge Friedmann "forwarded to the West Publishing Company... a copy of said opinion."

It should be observed that the Second

Circuit, as stated on p. 16 of the present petition for certiorari, never considered the New York Judiciary Law at all in ruling that Civil Rights Law Sec. 74 bestowed an absolute privilege upon West in publishing Judge Friedmann's decision.

This was in accord with the line pursued by West in its lower court briefs, whereby it sought to "bury" the Judiciary Law altogether and smother Beary's libel action and his appeal from Judge Glasser's order dismissing same with the shibboleth "frivolous."

In arguing on p. 4 of its brief that in publishing Judge Friedmann's decision as received from him, West did "all that matters," it was apparently oblivious of the mandate of Sec. 432 of the Judiciary Law, which does not allow any variation from a pattern common to "the judges or justices of every court of record" in New

York. All must "promptly cause to be delivered to the state reporter, without charge, a copy of every written opinion rendered in causes determined therein."

On p. 4 of its brief, West contends that Civil Rights Law Sec. 74 confers upon "any person" an absolute privilege to publish "a judge's opinion, regardless of whether that person is an 'unofficial' or an 'official' reporter and regardless of whether the Judiciary Law was or wasn't complied with."

West blindly adheres to this construction of Sec. 74, notwithstanding the fact that it does lead to absurd and frightening results, as happened in Branca v. Mayesh, 101 App. Div. 2d 872 (2d Dept.), aff'd 63 N.Y. 2d 994.

In that case, Mayesh at a lecture given by him to about 150 attorneys distributed materials containing allegedly defamatory references to Branca in the trial

transcript and in a complaint which had been dismissed in Branca's favor.

Although Mayesh was the plaintiff's attorney in the case against Branca, the Appellate Division held that "the lecture served valid educational purposes" and was entitled to "the protection of section 74."

The Court cited Williams v. Williams, 23 N.Y. 2d 592, where the Court of Appeals said, at p. 598:

> While the facts of this case may appear to fit within the wording of section 74, it would require us to attribute an extreme maliciousness to the Legislature to hold that the statute was intended to protect the defendant's attempt at defamation.

There the plaintiff had alleged that the defendant persuaded his corporation to commence an action against plaintiff, charging him with conspiring to misappropriate corporate trade secrets, and then sent printed copies to the trade.

With reference to Sec. 74 the Court

went on to say at p. 599, that "we will not blindly apply the words of a statute to arrive at an unreasonable or absurd result" and citing Rosenblatt v. Baer, 383 U.S. 75,86, that"'society has a pervasive and strong interest in preventing and redressing attacks upon reputation' and the courts are delegated with the responsibility of protecting that right."

Judge Burke, at p. 605 of his concurring opinion, indicated that Civil Rights Law Sec. 74, does not "permit persons to institute false and malicious actions and then publish copies of the pleadings in those actions with impunity."

This is, in effect, what Judge Friedmann did in maliciously composing his opinion defaming Beary as an attorney and then forwarding said decision to West, with the request that it be published. (See paragraphs "13", "16" and "21" of

the Beary complaint.)

West should have recognized the opinion, as the New York Law Journal did in refusing to print it (see par. "15" of Beary complaint), as an exercise in unorthodox, injudicious tactics by Judge Friedmann in an effort to besmirch and disgrace Beary.

In HNC Realty v. Bay View, 125 Misc. 2d 1088, 1093, the Court said that "it is true that a statute must be read and given effect as it was written by the Legislature..., but the construction cannot lead to absurdity, nor blindly to absurd results," citing Williams v. Williams (supra).

No rationalization can excuse what occurred in Branca v. Mayesh (supra) and in Lowenschuss v. West Publishing Co., 542 F.2d 180, where the rights and self-esteem of the plaintiffs were trampled on and their reputations as attorneys were

attacked and destroyed.

Needless to say, such decisions are a chilling assault on the sensibilities of all lawyers, who are fearful of being the helpless victims of still further ingenious methods of defamation.

Branca's reputation as an attorney could have been saved had the Court followed the precedent set in Williams v. Williams (supra), and Lowenschuss would still be able to hold his head high as an honorable member of the Bar if West, as appears on p. 182 of the Lowenschuss decision, had not "felt obliged to publish the opinion as originally written and without editorial comment, as is its unvarying practice" (underscoring added), although there was no statutory duty impelling West to do so.

Libel with impunity under Sec. 74

In affirming Branca v. Mayesh, 63 N.Y. 2d 994, the Court of Appeals held that

"this case did not involve a 'perversion of judicial proceedings' so as to come within the exception to the privilege set forth in Williams v. Williams (23 N.Y. 2d 592)."

The Appellate Division (101 App. Div. 2d 872) had ruled at p. 873, that the Williams case was inapplicable "in the absence of any allegation that the District Court action was brought maliciously and solely for the purpose of later defaming the plaintiff."

It would seem that the foregoing ingredient should not be required and that the Sec. 74 protection should extend only to persons disinterested in the lawsuit which was the subject of the report, as was held in Williams (supra).

Branca had been completely cleared in Rode v. Branca, 481 F. Supp. 808, 811, where in dismissing the complaint, the District Court found that Branca "had

comported himself within the ethical standard set forth in the Code of Professional Responsibility."

Yet, Mayesh was permitted to distribute copies of said pleading which had accused Branca of fraud and unethical conduct.

But according to Phillips v. Murchison, 252 F. Supp. 513, 523, Sec. 74 "immunizes 'any person' including parties to the litigation," citing New York appellate cases which had been decided long before Williams v. Williams and have undoubtedly been overruled by that landmark decision.

Phillips v. Murchison is in turn cited in Edmiston v. Time, Inc., 257 F. Supp.22, which refers to Sec. 74 as a "door-closing statute," giving rise to a policy in New York which "should be binding upon a federal court sitting within the state."

This case too, decided in 1966, was long before Williams v. Williams, which

latter case should have been binding upon the District Court and the Second Circuit in the present situation, as should have been the requirements of Secs. 431 and 432 of the Judiciary Law, all of which should have prevented Sec. 74 from closing the door on Beary's right to redress by way of a jury trial.

West should not be rewarded

It should be quite evident by now that West intends to monopolize the gathering and distribution of all judicial opinions, disregarding the restrictions of New York's Judiciary Law, of which it is too well aware, in obvious dereliction of Sec. 431's mandate to the State Reporter to publish each opinion "as soon as practicable after it is is rendered," constituting conduct for which West should not be rewarded by immunization under Sec. 74. Said section must be read in conjunction with Secs. 431 and 432.

2. WEST SHOULD HAVE BEEN ESTOPPED FROM INTERPOSING CIVIL RIGHTS LAW SEC. 74 AS A DEFENSE

In its answer, dated September 4, 1984, to the Beary complaint, "as and for a second affirmative defense," West pleaded as follows: "18. This action is barred by N.Y. Civil Rights Law Sec. 74."

Said statute was formerly Sec. 337 of the Civil Practice Act, and the Court of Appeals, referring to same, in Murray v. Brancato, 290 N.Y. 52,59, ruled that since the New York Supplement is published in Minnesota, "in no event could the statute confer immunity for publication outside the State" of New York.

By virtue of STARE DECISIS and the fact that West's New York Supplement is still published in Minnesota, as was the Advance Sheet which was the subject of Beary's suit, it is submitted that said Civil Rights Law Sec. 74 should not have been interposed as a defense and West's

present reliance on said statute is misplaced.

West publishes McKinney's Consolidated Laws of New York (Annotated), in which is set forth in Book 8 the present Civil Rights Law Sec. 74, with the following annotation numbered 14 and captioned "Publication outside the state" on p. 199 thereof:

> CPA Sec. 337 (now this section), which related to exemptions from liability for reporting any judicial, legislative, or other public official proceedings, conferred no immunity for publication outside the state. Murray v. Brancato, 1943, 290 N.Y. 52,48 N.E. 2d 257,146 A.L.R. 906.

There is no change of the foregoing in West's current Cumulative Annual Pocket Part, and it is therefore submitted that West should now be estopped from asserting that it was proper to interpose Sec. 74 as an affirmative defense.

In the 1955 edition of Cahill-Parsons New York Civil Practice, a similar annotation to CPA Sec. 337 appears.

3. WEST FORFEITED ANY CLAIMED IMMUNITY UNDER CIVIL RIGHTS LAW SEC. 74 BECAUSE IT DID NOT PUBLISH THE OPINION AS JUDGE FRIEDMANN WROTE IT, BUT RATHER WEST ADMITTEDLY ADDED BEARY'S FIRST NAME TO THE TITLE OF JUDGE FRIEDMANN'S OPINION, THEREBY EXACERBATING THE LIBEL

Petitioner disagrees with the contention by West on p. 2 cf its opposing brief that "the opinion of the Second Circuit contains a full statement of the facts of this case (A2-A4)."

On p. A-3, Judge Mansfield relates that West published Judge Friedmann's decision "as received (with the correction of a single typographical error)."

The title of the case as it appears in said opinion written by Judge Friedmann is "ESTATES ROOFING CO., INC. Plaintiff, - against - BEARY, Defendant," but in "editing" said opinion, West added petitioner's first name "Patrick" to his surname "Beary."

The addition by West of Beary's first

name is admitted by Arnold O. Ginnow, on p. 2 of his moving affidavit of August 30, 1984, wherein he refers to the addition of "first names of parties" among "the minor editorial changes" made by West's editors to Judge Friedmann's opinion.

Such addition surely was a "major" not a "minor" change, because it had the effect of dispelling from the minds of the readers of the opinion any doubt that it was indeed Patrick Beary, not any other Beary, who was the target of Judge Friedmann's remarks.

By making this change, and in such a reckless manner, West deprived itself of any immunity it now claims by virtue of Sec. 74 of the Civil Rights Law. (See second paragraph of Sec. 74, set forth on p. 3 of respondent's brief herein.) That "Patrick Beary, Esq." appeared as counsel in the opinion does not mean that he was also the defendant in the action.

4. PETITIONER'S APPEAL WAS NOT "PATENTLY FRIVOLOUS" AND DID NOT WARRANT THE IMPOSITION OF SANCTIONS BY THE SECOND CIRCUIT

It can be seen from West's argument under point 1 of its brief in opposition that the issues involved here are not simple and the Second Circuit's ruling interpreting Civil Rights Law Sec. 74 under "present-day New York law" may very well make this case one of first impression.

Yet, under point 2 of its brief, West contends that petitioner's appeal to the Second Circuit was "patently frivolous" and the "sanctions imposed by that Court were well warranted to deter this sort of abuse of the appellate process."

Of course, West's arguments would not be in that vein if the Second Circuit had limited its decision to a consideration of the larger aspects of the appeal, which by their very momentousness ought

to have dispelled any notion that the appeal was "frivolous."

In contrast, it is interesting to note that the same Second Circuit did not regard the plaintiff-appellant's appeal as "frivolous" in Davis v. Ross, 754 F. 2d 80 (1985), where Gail Davis, who was employed as an executive assistant by the well-known singer Diana Ross claimed damage to her "professional reputation" by reason of a letter written by Ms. Ross which the District Court determined was not libelous, since "the letter expresses only Ross' personal dissatisfaction with appellant, rather than a general lack of capacity or unfitness."

Surely, this was a much "milder" form of libel than the defamatory remarks directed against Beary in his professional capacity as an attorney at law by Judge Friedmann in his decision.

Nonetheless, the Second Circuit, instead of finding that Ms. Davis' appeal was "frivolous," reversed the District Court's dismissal of her complaint, ruling, at p. 84, that "based upon the standards articulated by the New York courts... the letter herein is reasonably susceptible of several interpretations, at least one of which is potentially libelous."

The Second Circuit could just as well have made the same ruling with respect to Beary's appeal. On the last page of his main brief submitted to that Court, Beary had argued that if the words complained of are susceptible of several meanings, one of which disgraces or discredits the plaintiff, it is for the jury, not the court, to say in which sense the words were used. See NY PJI Supp. 3:24, p.103, citing November v. Time, Inc. 13 N.Y. 2d 175, 179, Mencher v. Chesley, 297 N.Y. 94, 100. See also Sharon v. Time, Inc.,

575 F. Supp. 1162, 1165, and Carney v. Memorial Hospital, 64 N.Y. 2d 770.

West had argued in its memorandum submitted to the District Court, as appears on p. 39 of the present petition, that Judge Friedmann's derogatory remarks were not directed against Beary at all, but rather "was a comment on the wisdom of the legislators who enacted the provision" requiring contractors engaged in the home improvement business to be licensed.

Thus, the words Beary complained of did meet the test which was applied in Davis v. Ross (supra), and Judge Glasser's dismissal of his complaint should have been likewise reversed by the Second Circuit. Similarly in Belli v. Orlando Daily Newspapers, 389 F.2d 579, 585, the Court held that a jury "might reasonably conclude that the conduct imputed to Belli was incompatible with the standards of an ethical lawyer."

CONCLUSION

The controlling factor on this petition for certiorari appears to be as stated on p. 4 of respondent's brief: whether "the absolute privilege by Civil Rights Section 74 is conditioned upon compliance with Section 432 of the New York Judiciary Law, which requires judges to send their opinions to the State Reporter."

Before closing, it should be noted that no appeal to the Second Circuit would have been necessary if the District Court had denied West's motion pursuant to F.R.C.P. 56(e), based on its patent inadequacy.

Respectfully submitted,

PATRICK BEARY
Petitioner Pro Se
161-10 Jamaica Avenue
Jamaica, N.Y. 11432
(718) 526-4100

October 1, 1985